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Mark L. Shurtleff, Nancy L. Kemp; attorney for appellee.
Jason A. Schatz; Schatz & Anderson, LLC; attorney for appellant.

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IN THE UTAH COURT OF APPEALS

GENE DECKER, Petitioner-Appellant, vs. NANNETTE ROLFE, Respondent-Appellee.	)))))))))	**REPLY BRIEF OF APPELLANT** Case No. 20070210-CA

REPLY BRIEF OF APPELLANT

Appeal from a trial de novo judgment upholding the revocation of Mr. Decker's driver's license in the Third Judicial District Court in and for Salt Lake County, Salt Lake Department, State of Utah, the Honorable Timothy R. Hanson, presiding.

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FILED
UTAH APPELLATE COURTS
SEP 10 2007

IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

GENE DECKER, Petitioner-Appellant, vs. NANNETTE ROLFE, Respondent-Appellee.	)	**REPLY BRIEF OF APPELLANT** Case No. 20070210-CA

SUMMARY OF THE ARGUMENT

Deputy Marshall's statement that if he was Mr. Decker he would not take the chemical or breath test, operated to impermissibly influence Mr. Decker against taking the requested test. Mr. Decker's refusal was not voluntary and the resulting suspension of his license was erroneous.

The District Court had jurisdiction to hear the appeal from the Appellee's denial of his request for a hearing. Mr. Decker made a Request for Reconsideration when he requested the Driver License Division grant him a hearing which was subsequently denied. Moreover, a driver need not exhaust his administrative remedies as a pre-requisite for seeking Judicial Review of a suspension order issued by the Driver License Division pursuant to Utah Code Ann. § 53-3-223.

ARGUMENT

(The Single Point in the Opening Brief)

I. THE DEPUTY'S STATEMENT TO THE ARRESTEE THAT "IF IT WERE HIM HE WOULD NOT SUBMIT TO THE CHEMICAL TEST" RENDERS THE SUBSEQUENT REFUSAL AS INVOLUNTARY AND REQUIRES REINSTATEMENT OF THE DRIVER'S LICENSE.

The Appellee State of Utah claims Mr. Decker's sole argument on appeal is that Deputy Marshall's statement, "I, personally, would not submit to a chemical test," rendered Mr. Decker incapable of refusing because of his reliance on the Deputy's statement. Brief of Appellee at 15. The Appellee both misstates and overstates Mr. Decker's position.

As clearly articulated in the opening brief, Mr. Decker insists that his refusal to take a chemical test should be invalidated because the officer's expression of what he, himself, would do when asked to take such a test rendered the deputy's later request and warning to be without meaning and efficacy. Brief of Appellant at 8. Mr. Decker also stated in his opening brief that "[t]he analysis provided by Mr. Decker presents an issue of first impression in Utah yet receives support from those cases which analyze the critical evidence of voluntariness in other situations." Brief of Appellant at 8. Therefore, to no surprise, and as noted by the State, the cases cited by Mr. Decker are factually distinguishable from his case. Cases of first impression are named such because no other cases have decided the issue and addressed these same circumstances. That posture,

however, does not leave Mr. Decker without authority to support invalidating his refusal and reinstating his license.

Mr. Decker's arresting law enforcement officer during an hour transport to the sheriff's office engaged in several conversations with Mr. Decker while he was seated next to him, in the front seat of the patrol car. R. 78 at 13-15, 55, 61. The officer conceded that he spoke very honestly with Mr. Decker about all aspects of the situation. Id. at 15. Among the honest revelations made to the arrested person Mr. Decker was the Deputy's personal opinion that if he was Mr. Decker he would not submit to a chemical test; the deputy unquestionably knew that Mr. Decker was soliciting information about what to do and would use the deputy's opinion in making up his mind. R. 78 at 13-14.

To that point in the case the deputy had not formally requested that Mr. Decker submit to a chemical test. Not surprisingly, when the deputy did request Mr. Decker to submit to the test, Mr. Decker refused. He later indicated that refusal was based 100% on the deputy's opinion that the deputy would not take the test if he, the officer, was in the same situation as Mr. Decker. R. 78 at 14-15; 69-70. Any following admonitions by the deputy about the consequences of that decision were undermined, discounted and rendered ineffectual by Mr. Decker given his reliance on the deputy's experience and knowledge of the circumstances, the law and the legal process.

While the State refers to this dialog between the two as Mr. Decker's "verbal games," a review of the testimony about the discussions between the two reveals no games, but rather a genuine desire to have the officer provide guidance to Mr. Decker.

Even the deputy saw the questions as intending to illicit advice from him and initially refused to give it; then despite that recognition, he gave an answer to Mr. Decker couched as his personal opinion of what he would do in the situation. The case law cited by Mr. Decker highlights a variety of considerations which urge the court to disavow his refusal, construe the expressed personal opinion of the deputy as improper and violative of the standards of establishing a knowing waiver of one's rights and grant Mr. Decker the relief of reinstating his license.

Mr. Decker will not duplicate those arguments here as they are detailed in the opening brief beginning at page 5. However, he reiterates in substance that in addressing this novel question, support may be gleaned from statutes and cases which detail that an officer is responsible in the given situation to provide warnings which are meaningful and specific to the situation so as to permit a finding that any refusal is volitional.

And while Mr. Decker never has argued that he was dazed or injured, he was expressly informed by the officer that he wouldn't himself take the test. The deputy's admonitions subsequent to that expression were meaningless and in conflict with the deputy's duty and obligation. Utah Code Ann. § 41-6a-520 (2006)(an arresting officer has the duty to properly advise a driver); State v. Beck, 597 P.2d 1335 (Utah 1979)(it is important that a law enforcement officer make a determination that a motorist has refused to take a test on the basis of conduct which clearly indicates a **volitional** refusal); Mills v. Swanson, 460 P.2d 704 (Idaho 1969)(what constitutes a refusal to take the test must depend on the circumstances of the case).

Here is where the Fifth Amendment and Miranda cases help analytically. In State v. Hample, 706 P.2d 1173 (Alaska 1985), and State v. Sampson, 808 P.2d 1100 (Utah App. 1990), the courts found officers who responded to a suspect's questions in ways which either demeaned the rights being explained or minimized their import given the officer's own opinions to the contrary, resulted in findings that invalidated the waivers obtained as involuntary. In essence, the deputy's opinion (aware that the opinion was to be considered as advice) that he would not take the test affected Mr. Decker's refusal in this case rendering it involuntary just as the Hampel officer's explanation of the obstacles surrounding getting a lawyer rendered his choice to waive counsel as involuntary and just as the Sampson officer encouraging that suspect "to just get it over with" rather than to get him a lawyer or clarify the request assisted in rendering that waiver involuntary.

Similarly, the deputy's later reading (or re-reading) of the admonition and/or new waiver of rights to Mr. Decker are consistent with the officers' actions in Sampson and Hampel. After having demeaned the choice or discounted its importance, the Sampson and Hampel officers failed to cure their previously inappropriate responses to questions from suspects intent on receiving direction and assistance as did Mr. Decker's officer here. See Opening Brief at pp. 9-12. Mr. Decker was unquestionably influenced significantly by the deputy's personal opinion that he would not take the chemical test in this case. That opinion expressed by the officer was inappropriate and rendered the choice to be made by Mr. Decker as improperly influenced and involuntary.

Because the deputy inappropriately influenced Mr. Decker's decision, failing in his obligation opting instead to tell him what he would do in the situation, this Court should find Mr. Decker's refusal to be improperly given and involuntary. The resulting suspension of his license is a direct consequence of the advice provided by the deputy and should be vacated.

(New Point Raised by Appellee as its First Point)

II. THE DISTRICT COURT HAD JURISDICTION TO HEAR PETITIONERS APPEAL FROM THE DENIAL OF HIS REQUEST FOR AN ADMINISTRATIVE HEARING.

The State claims that Mr. Decker failed to exhaust his administrative remedies and that the district court was without jurisdiction to hear the case. Brief of Appellee, at Point I, pages 7-14. The Appellee State of Utah previously raised this same issue before this Court as a Motion for Summary Disposition. This Court denied that request on May 11, 2007, entering an Order noting that the Court had previously rejected such an argument in Morgan v. Blackstock, 1999 Utah App 162. See Addendum A for copy of the Order; see Addendum B for copy of Morgan v. Blackstock. The Court indicated that summary disposition was inappropriate but gave leave for the Appellee to raise the issue for full consideration if it chose to do so.

Mr. Decker insists the Appellee's argument is without merit for two reasons: first; Mr. Decker did make a request for reconsideration of the suspension of his driver license before the Division; and second, state law does not require a driver to exhaust

administrative remedies prior to filing an appeal of the Division's decision to suspend or revoke a license in district court.

Taking the second reason first, a driver whose driver license has been suspended pursuant to Utah Code Ann. § 53-3-223 need not exhaust his administrative remedies before seeking judicial review of his suspension. This issue, as this Court noted in denying the Motion for Summary Disposition, has already been addressed and decisively decided by this Court in the case of Morgan v. Blackstock.

In Morgan, this Court ruled that:

> Although Utah Code Ann. § 53-3- 223(6) (1998) requires the Division to grant a hearing if requested in writing within ten days of arrest, no statute *requires* a hearing to be held as a prerequisite to judicial review. Utah Code Ann. § 53-3-223(8)(B)(1998) states that "[a] person whose license has been suspended by the division under this subsection may file a petition within 30 days after the suspension for a hearing on the matter which, if held, is governed by Section 53-3-224." Utah Code Ann. § 53-3-224 (1998) states, in part, that a person whose license "has been canceled, suspended, or revoked by the division may seek judicial review of the division's order." In fact, the Division's order suspending Morgan's license advised him that he could seek judicial review in district court. Under Utah Code Ann. § 63-46b-14(2)(1997), a petitioner need not exhaust all administrative remedies when "this chapter or any other statute states that exhaustion is not required."

Morgan v. Blackstock, 1999 UT App. 162 (emphasis in original). Notably, the Morgan Court decision, as noted in the above quote, reviewed statutory language to reach its decision. The plain language of the statutes dictates the decision and negates the need for any reconsideration as urged by Appellee.

Returning to the first reason for rejecting the Appellee's argument, the Division provided Mr. Decker notice that his license was suspended in a letter dated June 14,

2006. In that letter the Division informed Mr. Decker he could request a reconsideration of the suspension and if that reconsideration were to be denied he could appeal to the district court for review. See Addendum C. Importantly, the Petitioner Mr. Decker in this case had already filed an appropriate request for consideration of the Division's action when he filed a pro se, hand written letter dated June 5, 2006, requesting that he be granted a hearing despite the fact that he had not made his request within ten days. See Addendum D.

The Division denied his request for reconsideration in the Division's letter sent to Mr. Decker, dated June 8, 2006, specifically recognizing his hand written letter stating, "You may appeal this action in the district court in the county in which the offense occurred within thirty (30) days of the effective date of your suspension." See Addendum E. By the inclusion of this language in its letter the Division Appellee is effectively estopped in this case against Mr. Decker from arguing the district court was without jurisdiction to hear his appeal. Accordingly, Mr. Decker did attempt to invoke his administrative remedies and was denied by the Driver License Division.

Despite Mr. Decker's failure to submit a written request for a hearing within 10 days of the date of his arrest, Mr. Decker filed a timely request for reconsideration which was subsequently denied and he followed that action with a timely Petition for Judicial Review recognized as appropriate by the Division. This case is not the case to review whether Morgan and the plain language of the appropriate sections of the Utah Code need to be reconsidered. This Court should affirm its earlier decision on the denial of the

summary disposition and deny the State's request to find that the district court lacked jurisdiction.

CONCLUSION

Mr. Decker's driver's license was suspended for refusing to take a chemical test as requested by the deputy who had previously informed him that the Deputy himself would not take the test if he were Mr. Decker. The Deputy's action rendered Mr. Decker's refusal as involuntary and the resulting suspension of his license as erroneous.

Mr. Decker's appeal to the district court was appropriately filed, as is his appeal to this Court, inasmuch as his hand written letter was accepted and considered as a request for reconsideration by the Division itself which indicated his action was appropriate to the district court. Further, current controlling authority at the time of his filing into district court neither required the Division's permission nor exhausting its remedies.

Therefore, for all or any of the foregoing reasons Mr. Decker respectfully requests that the Order of the District Court denying his Petition for Judicial Review and upholding the suspension order issued by the Driver License Division be overturned and that his driver license be reinstated immediately.

DATED this 10th day of September, 2007.

JASON SCHATZ
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, Jason Schatz, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing Reply Brief of Appellant to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and two copies to be mailed, postage prepaid to Nancy L. Kemp, Assistant Attorney General, 160 East 300 South, Fifth Floor, P.O. Box 140858, Salt Lake City, Utah, 84114-0858, this 10th day of September, 2007.

JASON SCHATZ
Attorney for Appellant

I mailed copies to the Utah Court of Appeals and to Assistant Attorney General Nancy L. Kemp as indicated above this _____ day of September, 2007.

_____

ADDENDA

ADDENDUM A

FILED
UTAH APPELLATE COURTS
MAY 11 2007

IN THE UTAH COURT OF APPEALS

----ooOoo----

Gene Decker, Plaintiff and Appellant, v. Nanette Rolfe, Bureau Chief Driver Control Bureau, Driver License Division, Department of Public Safety, State of Utah, Defendant and Appellee.	)	ORDER Case No. 20070210-CA

This matter is before the court on Appellee's motion for summary disposition. Appellant has filed a response to the motion. Appellee argues that this court does not have subject matter jurisdiction over this appeal because Appellant did not exhaust his administrative remedies. This court has previously rejected such an argument in Morgan v. Blackstock, 1999 UT App 162 (per curiam). Accordingly, summary disposition is not appropriate. With the being said, Appellee is entitled to present the issue, if it so chooses, for full consideration by the court in its brief.

IT IS HEREBY ORDERED that Appellee's motion for summary disposition is denied, and a ruling on the issues raised therein is deferred pending plenary presentation and consideration of the appeal. See Utah R. App. P. 10(f). The appeal shall proceed to the next procedural stage.

DATED this 11th day of May, 2007.

FOR THE COURT:

Judith M. Billings, Judge

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2007, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

JASON SCHATZ
SCHATZ & ANDERSON
356 E 900 S
SALT LAKE CITY UT 84111

NANCY L KEMP
ASSISTANT ATTORNEY GENERAL
160 E 300 S 5TH FL
PO BOX 140858
SALT LAKE CITY UT 84114-0858

Dated this May 11, 2007.

By Janet Alexander
Deputy Clerk

Case No. 20070210
District Court No. 060911537

ADDENDUM B

Court of Appeals of Utah.
Stephen Lynn MORGAN, Petitioner and Appellant,
v.
G. Barton BLACKSTOCK, Bureau Chief, Driver License Division, Respondent and Appellee.
No. 9813400-CA.
May 13, 1999.

D. Bruce Oliver, Salt Lake City, for appellant.
Jan Graham and James H. Beadles, Salt Lake City, for appellee.

Before WILKINS, BENCH, and ORME, JJ.

MEMORANDUM DECISION

PER CURIAM.
*1 Appellant Stephen Lynn Morgan appeals from a district court judgment following a trial de novo, which affirmed a suspension of his driver's license by the Driver License Division.

We first consider the Division's claim this court lacks subject matter jurisdiction based on Morgan's failure to request a presuspension hearing before the Division prior to seeking judicial review. The district court denied a motion to dismiss on this basis. Although Utah Code Ann. § 53-3-223(6) (1998) requires the Division to grant a hearing if one is requested in writing within ten days of arrest, no statute *requires* a hearing to be held as a prerequisite to judicial review. Utah Code Ann. § 53-3-223(8)(B)(1998) states "[a] person whose license has been suspended by the division under this subsection may file a petition within 30 days after the suspension for a hearing on the matter which, if held, is governed by Section 53-3-224." Utah Code Ann. § 53-3-224 (1998) states, in part, that a person whose license has "been canceled, suspended, or revoked by the division may seek judicial review of the division's order." In fact, the Division's order suspending Morgan's license advised him that he could seek judicial review in district court. Under Utah Code Ann. § 63-46b-14(2)(1997), a petitioner need not exhaust all administrative remedies when "this chapter or any other statute states that exhaustion is not required." The trial court did not err in denying the motion to dismiss based upon its construction of the statutes governing judicial review.

The Division also seeks dismissal of the appeal as moot because the suspension has expired and the requested relief could not be obtained on appeal. However, Morgan's

request in district court sought reversal of the suspension or, if it had expired, expungement of Morgan's driving record. Based upon the latter request, the appeal is not moot.

Morgan argues the trial court's refusal to hear defense counsel's closing arguments denied him due process by preventing him from raising all of the defenses available to him. Morgan's contention the Division did not present any evidence that he received timely notice of the Division's intent to suspend his license is without merit. The DUI Summons and Citation contained notice of the intent to suspend his license and a certification by the arresting officer that "a copy of the summons and citation was duly served upon the defendant according to law on the above date," referring to the July 25, 1997 date of arrest. In addition, the officer testified at the trial de novo that he filled out the DUI citation and he issued it to Morgan "directly after [he] performed the intoxilizer test and completed the form." Evidence supporting timely notice was entered in the record without objection, and Morgan presented no conflicting evidence. Morgan asserted his other procedural argument at trial, which resulted in a ruling that service of the DUI summons and citation on the Division was timely. He has not attempted to demonstrate on appeal that this finding was erroneous. Because the argument that the Division did not demonstrate compliance with the statutory notice requirements is without merit, Morgan was not prejudiced by not being allowed to present closing argument on these claimed defenses.

*2 Accordingly, we affirm the district court's judgment following the trial de novo.

Utah App.,1999.
Morgan v. Blackstock
Not Reported in P.3d, 1999 WL 33244737 (Utah App.), 1999 UT App 162

ADDENDUM C

Jon M. Huntsman, Jr.
Governor
Robert L. Flowers
Commissioner

State of Utah
DEPARTMENT OF PUBLIC SAFETY
DRIVER LICENSE DIVISION

Nannette Rolfe
Director

P.O. Box 30560
Salt Lake City, Utah 84130-0560
(801) 965-4437

Date of Arrest: 21 May 2006
Date of Birth: 10 Dec 1962
License/File Number: 14676805
Date: 14 Jun 2006
This Order is Effective
12:01 AM on 20 Jun 2006

GENE DALE DECKER
8630 W ENQUINOX CIR
COPPERTON UT 84006

As a result of refusal to submit to a chemical test on a second or subsequent alcohol arrest while driving a motor vehicle, a motorboat or an off-highway vehicle, your driving privilege is revoked for a period of twenty-four (24) months effective 20 Jun 2006. The basis for this action is the hearing officer's findings of fact and conclusion that you refused to submit to a chemical test after being requested and warned by a peace officer, or you failed to request a hearing, or you failed to appear for the hearing, contrary to Utah Code Annotated 41-6-44.10, renumbered to 41-6a-521, or the implied consent law of another state.

This action is in accordance with Titles 41 and 53 Utah Code Annotated, 1953. This notice does not replace any prior notice already in effect.

*****IMPORTANT INFORMATION - PLEASE READ*****

When your driving privilege has been revoked for an alcohol violation **you must discontinue driving** all motor vehicles. It is a misdemeanor to operate any motor vehicle upon the highways of this state until the sanction period is over and you have reinstated and obtained a valid driving privilege. **Effective immediately**, driving with a measurable or detectable amount of alcohol in the body is a violation of UCA 41-6a-530 and may result in an additional 1-year period of revocation.

In compliance with UCA 63-46b-13, a written request for reconsideration of the evidence presented at the administrative hearing may be filed with the Driver License Division, within twenty (20) days of the effective date of this notice. If the division denies the request, the petitioner may appeal to the District Court, in the county of the incident, in compliance with UCA 53-3-224.

WHEN YOU ARE ELIGIBLE TO REINSTATE YOUR DRIVING PRIVILEGE, YOU MUST COMPLY WITH THE FOLLOWING:

- Pay a $50.00 reinstatement fee. Pay an administrative fee of $150.00. Other fees may apply.
- Make check or money order payable to: Utah Department of Public Safety.
- Please indicate your license or file number on the check or money order and mail to the above address.
- Based on this refusal, you will have an alcohol restriction placed on your driving privilege for a period of ten (10) years from the beginning date of the revocation. When an alcohol restriction has been placed on your driving privilege, you must not drive if you have any alcohol in your system.
- Pursuant to 41-6a-518.2, if your arrest date was on or after May 1, 2006, you are required to have an Ignition Interlock Device installed in any vehicle that you operate for a period of 3 years from the effective date of this notice. Operating a vehicle without an Ignition Interlock Device when you are an "Interlock Restricted Driver" is a violation of 41-6a-518.2 and may result in vehicle impoundment and additional Ignition Interlock Device restriction time.
- Apply for a new driver license or driving privilege card by taking the required tests and paying the fee.

Respectfully,

Nannette Rolfe, Director
Driver License Division

CC:

A133:JR

ADDENDUM D

964-4499

June 5, 2006

Driver's License Division
P.O. Box 30560
Salt Lake City UT
84130

Attn: John Fairbanks
D.U.I Department

Re: Gene D. Decker
8630 W. Equinox Cir.
Copperton UT
84006
5C3-0267

I am respectfully requesting your consideration to grant me a hearing re: re-instating my Utah driver's license. I was advised on Friday, evening, June 2, 2006, by Steve Marshall of the Salt Lake County Sheriff's office that such a hearing can be held within 10 days of an official taking possession of your driver's license (mine was taken on Sunday, May 21, 2006). I was not aware this is possible and as of this date have not received a letter in the mail advising me this was possible. As the ten days have expired since my license was taken I am asking for your consideration in this matter.

Respectfully submitted

ADDENDUM E

Sta') of Utah

DEPARTMENT OF PUBLIC SAFETY
DRIVER LICENSE DIVISION

Jon M. Huntsman Jr
Governor

Robert L. Flowers
Commissioner

Nannette Rolfe
Director

P.O. Box 30560
Salt Lake City, Utah 84130-0560
(801) 965-4437

06-08-06

GENE D DECKER
8630 W EQUINOX CIR
COPPERTON UT 84006

File: 14676805
Arrest Date: 05-21-06
DOB: 12-10-62

Dear Driver:

Recently, you were arrested for Driving Under the Influence and were served with a notice of this Department's intention to deny, suspend, revoke or disqualify your Utah driving privilege as a result. In that notice you were informed that you have the right to request in writing a hearing on this intended suspension. The notice specified that your WRITTEN REQUEST must be sent to the Department WITHIN TEN (10) DAYS of the date of arrest. (Utah Code Annotated 41 and 53.)

Request Date: 06-05-06 Fax Date: 06-05-06

The Department has received your written request for a hearing in this matter. However, the evidence on your letter indicates that the request was not submitted within the statutorily mandated 10-day period. Therefore, the Department must deny your request for an administrative hearing on this matter. The suspension of your Utah driving privilege will automatically take place on the 30th day after the date of your arrest.

You may appeal this action in the district court in the county in which the offense occurred within thirty (30) days of the effective date of your suspension.

Respectfully,

Nannette Rolfe, Director
Driver License Division

LR
D906
RQ4H